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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DAVID L. SMITH,

Petitioner,

v.

SUPREME COURT OF THE STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

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108 pp

QUESTIONS PRESENTED FOR REVIEW

Whether since the federal judiciary has clearly demonstrated that it has no intention of reviewing, rehearing, reconsidering, amending, modifying, vacating, or correcting the harsh and unjustified sanctions and discipline previously imposed against Mr. Smith by the Tenth Circuit, the District Court and their disciplinary panels, it is impossible for him to demonstrate prior to reinstatement that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted, as required by the Colorado Supreme Court in its (March 3, 1997) opinion, or to file with committee counsel the affidavit required by C.R.C.P. 241.22(b).

Whether by issuing its order summarily denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court arbitrarily deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fourteenth Amendment right to due process of law.

Whether the Colorado Supreme Court also arbitrarily deprived Mr. Smith of his First and Fourteenth Amendment right to access to the courts to petition the government for a redress of grievances.

Whether since no other attorney has been suspended indefinitely from the practice of law in the State of Colorado based on his financial inability to pay more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the federal courts, the Colorado Supreme Court arbitrarily deprived Mr. Smith of his Fourteenth Amendment right to the equal protection of the laws.

Whether since no legal or factual basis existed for the Colorado Supreme Court's order denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, it was reasonably questionable whether the Colorado Supreme Court could be a fair and impartial decision-maker in this disciplinary case against him, in violation of his Fourteenth Amendment right to due process of law.

Whether by issuing its order summarily denying Mr. Smith's petition for rehearing of its order summarily denying his verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court again deprived him of his First and Fourteenth Amendment rights.

Whether by indefinitely suspending Mr. Smith from the practice of law in the State of Colorado without following the attorney disciplinary rules it implements, including C.R.C.P. 241.7(2), 241.14(a), 241.17(d), and 241.22(a) and (b), the Colorado Supreme Court has decided an important federal question in a way that conflicts with the Fifth Circuit's decision in Dailey v. Vought Aircraft Co., 141 F.3d 224 (5th Cir. 1998).

Whether the disciplinary opinion issued by the Colorado Supreme Court on March 3, 1997 is inconsistent with the Colorado Supreme Court's order in People v. Smith, Case No. 96SA306.

Whether by summarily denying Mr. Smith's motion to vacate the (March 3, 1997) disciplinary opinion and to expunge the disciplinary record created by this opinion, the Colorado Supreme Court again deprived Mr. Smith of his First and Fourteenth Amendment rights.

Whether the Colorado Supreme Court's (March 3, 1997) disciplinary opinion is null and void, and it is no longer equitable that this opinion should have prospective application.

Whether by merely rubber-stamping the Tenth Circuit disciplinary panel's transparently invalid suspension order, the Colorado Supreme Court deprived Mr. Smith of his Fourteenth Amendment right to due process of law.

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People v. Smith, Case No. 96SA306 (Colo.) (unpublished order dated June 19, 1998).

People v. Smith, Case No. 96SA306 (Colo.) (unpublished order dated July 1, 1998).

JURISDICTION

The orders sought to be reviewed were entered on June 19, 1998 and July 1, 1998. Rehearing of the Colorado Supreme Court's (June 19, 1998) order summarily denying Mr. Smith's motion to vacate its (March 3, 1997) disciplinary opinion and to expunge the disciplinary record created by this opinion was summarily denied by order dated July 1, 1998.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the Colorado Supreme Court's orders of June 19, 1998 and July 1, 1998 is 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment I of the Constitution of the United States provides in relevant part as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment XIV, Section 1 of the Constitution of the United States provides in relevant part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the Colorado Supreme Court:

I. STATEMENT OF THE CASE

On November 29, 1993, the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Stephanie K. Seymour, Chief Judge, and Bobby R. Baldock and Wade Brorby, Circuit Judges) issued its order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals in four federal civil rights cases,[1] and for his failure to

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[1]Mr. Smith denies that the appeals he filed from the United States District Court for the District of Colorado to the Tenth Circuit were "frivolous." See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per curiam) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent). By refusing to hold a hearing, at which Mr. Smith would have the opportunity to present expert testimony and other relevant evidence on this issue--a blatant and egregious violation of Fed. R. App. P. 46--the Tenth Circuit disciplinary panel deprived him of his liberty and property interests in his

comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado,[2] all in alleged violation of

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good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. See Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland v. Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

[2]Because the disciplinary sanctions imposed against Mr. Smith (i.e., indefinite suspension from the practice of law in the Tenth Circuit) were "punitive, to vindicate the authority of the court," rather than "remedial, and for the benefit of the complainant," they were criminal rather than civil in nature; and he was therefore entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit disciplinary panel for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed

the ABA Code of Professional Conduct.[3] See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been "satisfied."[4] See id.

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against him by the Tenth Circuit and the District Court. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). Further, as a matter of equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because he was convicted and punished in attorney disciplinary proceedings rather than in criminal contempt proceedings.

[3]Mr. Smith denies that he violated the ABA Code of Professional Conduct.

[4]As a part of his efforts to persuade the Tenth Circuit disciplinary panel to review, reconsider and correct

On March 3, 1997, the Colorado Supreme Court issued its opinion (effective June 6, 1997) suspending Mr. Smith from the practice of law in the State of Colorado for nine months based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order. See People v. Smith, 937 P.2d 724 (Colo.), cert. denied, ____ U.S. ____, 118 S.Ct. 158, 139 L.Ed.2d 103 (1997). Prior to reinstatement, Mr. Smith must demonstrate that all sanctions imposed against him by the Tenth Circuit and the

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its (November 29, 1993) suspension order, Mr. Smith submitted affidavits and other evidentiary materials showing that he was financially unable to pay all or any part of the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the District Court. At the time of the submission of these evidentiary materials, Mr. Smith had a negative net worth of more than $360,000.00. Currently, Mr. Smith has a negative net worth of more than $400,000.00. Due to his indefinite suspension from the practice of law in the federal and state courts, Mr. Smith has no income from which his negative net worth could be reduced, or from which harsh and unjustified sanctions of more than $50,000.00 could be paid.

District Court have been "satisfied" and that all federal suspensions have been lifted.[5] See id.

On February 11, 1998, the Colorado Supreme Court issued its order summarily denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, despite the fact that it is impossible for him to comply with the Colorado Supreme Court's (March 3, 1997) opinion or to file with committee counsel the affidavit required

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[5]Mr. Smith is therefore being subjected to an indefinite suspension from the practice of law in the State of Colorado, in violation of C.R.C.P. 241.7(2), which provides that:

> Suspension is the temporary suspension by the Supreme Court of a lawyer's license to practice law in this state, subject to readmission as provided by C.R.C.P. 241.22(a). Suspension shall be for a definite period of time not to exceed three years.

Furthermore, the Colorado Supreme Court refused to afford Mr. Smith the notice and evidentiary hearing required by C.R.C.P. 241.14(a) and 241.17(d) before indefinitely suspending him from the practice of law in the State of Colorado.

by C.R.C.P. 241.22(b), which provides that:

> [A] lawyer who has been suspended for a period of one year or less shall be reinstated by order of the Supreme Court, provided the lawyer files with the Committee Counsel within 30 days prior to the expiration of the period of suspension an affidavit stating that the lawyer has fully complied with the order of suspension and with all applicable provisions of this Chapter.

On February 19, 1998, the Colorado Supreme Court issued its order summarily denying Mr. Smith's petition for rehearing of its (February 11, 1998) order.

On June 19, 1998, the Colorado Supreme Court issued its order summarily denying Mr. Smith's motion to vacate the disciplinary opinion it issued on March 3, 1997 and to expunge the disciplinary record created by this opinion.

On July 1, 1998, the Colorado Supreme Court issued its order summarily denying Mr. Smith's petition for rehearing of its (June 19, 1998) order.

II. ARGUMENT

In his verified motion for order reinstating him to the practice of law in the State of Colorado, Mr. Smith argued that since the federal judiciary has clearly demonstrated that it has no intention of reviewing, rehearing, reconsidering, amending, modifying, vacating, or correcting the harsh and unjustified sanctions and discipline previously imposed against him by the Tenth Circuit, the District Court and their disciplinary panels, it is impossible for him to demonstrate prior to reinstatement that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted, as required by the Colorado Supreme Court in its (March 3, 1997) opinion, or to file with committee counsel the affidavit required by C.R.C.P. 241.22(b). See Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948) (impossibility of performance constitutes a defense to contempt); United States v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) (the court must consider present inability to comply with the order in question); Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (citing Maggio v. Zeitz). Therefore, by issuing its order summarily denying Mr. Smith's

verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court arbitrarily deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fourteenth Amendment right to due process of law. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Johnson v. Board of County Commissioners, 85 F.2d 489 (10th Cir. 1996). The Colorado Supreme Court also arbitrarily deprived Mr. Smith of his First and Fourteenth Amendment right to access to the courts to petition the government for a redress of grievances. See NAACP v. Button, 371 U.S. 415, 83

S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976), citing Harbolt v. Alldredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972). Since no other attorney has been suspended indefinitely from the practice of law in the State of Colorado based on his financial inability to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the federal courts, the Colorado Supreme Court arbitrarily deprived Mr. Smith of his Fourteenth Amendment right to the equal protection of the laws. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Baird v. State Bar of Arizona, 401 U.S.

1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Since no legal or factual basis existed for the Colorado Supreme Court's order denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, it was reasonably questionable whether the Colorado Supreme Court could be a fair and impartial decision-maker in this disciplinary case against him, in violation of his Fourteenth Amendment right to due process of law. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a

decision); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Finally, by issuing its order summarily denying Mr. Smith's petition for rehearing of its order summarily denying his verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court again deprived him of his First and Fourteenth Amendment rights. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). Under these circumstances, the Colorado Supreme Court has decided an important federal question in a way that conflicts with the decision of a United States court of appeals, and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In Dailey v. Vought Aircraft Co., 141 F.3d 224 (5th Cir. 1998), an attorney was disbarred from practice in the United States District Court for the Northern District of Texas for her failure to comply with an order to pay sanctions of $8,478.92 within 11 days.[6] On appeal, the United States Court of Appeals for

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[6]The Fifth Circuit's opinion in Dailey is reproduced in the appendix to this petition for a writ of certiorari.

the Fifth Circuit reversed and vacated the district court's order of disbarment, holding that the district court had deprived the attorney of her right to due process of law as she was not afforded notice and an opportunity to be heard prior to being expelled from the bar. The Fifth Circuit said:

> Federal district courts are bound by the disciplinary rules they implement. Matter of Thalheim, 853 F.2d 383, 386, 388 (5th Cir. 1988). Although we conclude that the only logical reading of [N. DIST. TEX. R. 13.2(b)(1996)] requires notice and an opportunity to be heard before an attorney is disciplined by the court, any ambiguity in the rule must be construed in favor of the attorney charged with behavior warranting discipline. Brown, 72 F.3d at 29. Cf. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy this right they must first be notified.")

See Dailey at 230. Therefore, by indefinitely suspending Mr. Smith from the practice of law in the State of Colorado without following the attorney disciplinary rules it implements,

including C.R.C.P. 241.7(2), 241.14(a), 241.17(d), and 241.22(a) and (b), the Colorado Supreme Court has decided an important federal question in a way that conflicts with the Fifth Circuit's decision in Dailey.

The disciplinary opinion issued by the Colorado Supreme Court on March 3, 1997 is not only inconsistent with the Fifth Circuit's opinion in Dailey. This disciplinary opinion is also inconsistent with the order issued by the Colorado Supreme Court in People v. Smith, Case No. 97SA169.[7] Furthermore, by summarily denying Mr. Smith's motion to vacate the (March 3, 1997) disciplinary opinion, and to expunge the disciplinary record created by this opinion, the Colorado Supreme Court again deprived Mr. Smith of his First and Fourteenth Amendment rights. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). Under these circumstances, the Colorado Supreme Court's (March 3, 1997) disciplinary opinion is null and void, and it is no longer equitable that this opinion should have prospective application.

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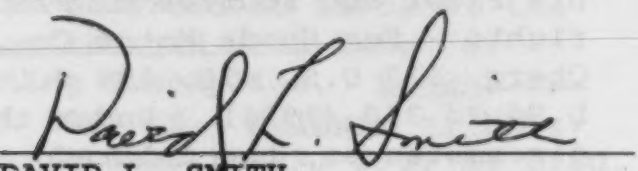
[7]This order, as well as the findings of fact and recommendations of the hearing board which this order affirmed, is reproduced in the appendix to this petition for a writ of certiorari.

By merely rubber-stamping the Tenth Circuit disciplinary panel's transparently invalid suspension order, the Colorado Supreme Court deprived Mr. Smith of his Fourteenth Amendment right to due process of law. See In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). Mr. Smith therefore requests this Court to grant his Petition for a Writ of Certiorari to the Colorado Supreme Court, and such other and further relief as may be just under the circumstances, including an order under 28 U.S.C. § 2106 reversing and vacating the disciplinary opinion issued by the Colorado Supreme Court on March 3, 1997, and expunging the disciplinary record created by this opinion.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

APPENDIX

SUPREME COURT OF COLORADO
No. 96SA306 March 3, 1997

THE PEOPLE OF THE STATE OF COLORADO,
Complainant,

v.

DAVID LEE SMITH,
Attorney-Respondent.

Original Proceeding in Discipline

EN BANC ATTORNEY SUSPENDED

Linda Donnelly, Disciplinary Counsel
James C. Coyle, Assistant Disciplinary Counsel
Denver, Colorado

Attorneys for Complainant

David Lee Smith, Pro Se
Denver, Colorado

PER CURIAM

This is a reciprocal discipline proceeding arising from the respondent's discipline by the United States Court of Appeals for the Tenth Circuit (court of appeals). The court of appeals suspended the respondent from practicing before it for an indefinite period, with reinstatement contingent on the respondent's paying sanctions imposed against him by the court of appeals and the United States District Court for the District of Colorado (district court). A hearing panel of the supreme court grievance committee approved the findings and recommendation of a hearing board that the respondent be suspended from the practice of law for nine months; that prior to reinstatement he demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied that all federal suspensions have been lifted; and in the event that the respondent meets those conditions prior to the expiration of the nine-month suspension, that this court give favorable consideration to the respondent's immediate reinstatement. The respondent has filed exceptions to the panel's action. We accept the hearing panel's and hearing board's recommendations.

I.

The respondent was admitted to practice law in Colorado in 1975. Based on the respondent's testimony and the

record, which included the record of the proceedings in the court of appeals, the hearing board concluded that the following had been proven by clear and convincing evidence.

On September 15, 1993, the court of appeals issued an order to the respondent to

> show cause in writing why he should not be fined, disbarred or otherwise disciplined for his actions in numbers 93-1070 and 93-1139, Deherrera v. Denver, [7 F.3d 1044 (10th Cir. 1993)] after the entry of this court's orders in Sandlin v. Canady (In re Canady), [993 F.2d 1551 (10th Cir. 1993)] and Dunkin v. Louisiana-Pacific Corporation, Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), [cert. denied, 114 S.Ct. 87 (1993)]. The Panel in Deherrera referred this matter to this Discipline Panel because the appeal and petition for writ of mandamus were frivolous. In Casillan v. Regional Transportation District, [986 F.2d 1426 (10th Cir. 1993)], the court also found the appeal to be frivolous. Filing a frivolous appeal is a ground for discipline because it is a violation of 10th Cir. R. 46.5.

The crux of the Deherrera matter was that the respondent had filed a number of interlocutory appeals to the court of appeals on the issue of the validity of sanctions imposed against him by the district court in that case and earlier cases. The law in the Tenth Circuit is that an order imposing sanctions on a lawyer is not a final appealable decision, but is interlocutory so an immediate appeal is not permitted. See G.J.B. & Assocs. V. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). The respondent's twenty-two page answer to the show cause order was filed on October 4, 1993. In it, he asked "to be heard in person in defense and in mitigation with respect to the charges being brought against him . . . ."

The court of appeals set the matter down for a hearing on November 12, 1993, allowing fifteen minutes for oral argument, and directed the respondent to file a supplemental response to the order to show cause addressing why he should not be disciplined for filing a frivolous appeal in Casillan, as referred to in the original show cause order. (The respondent's October 4 response only alluded to the DeHerrera case.)

On October 22, the respondent filed a motion to vacate the November 12 hearing and asked for additional time to file the supplemental response. He also

requested an "evidentiary hearing or designation of a special master for purposes of conducting an evidentiary hearing" (emphasis added), merely stating that his "case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony . . . ." The respondent did not elaborate further on the nature of the evidence he wished to present, nor did he make an offer of proof. He filed a thirty-one page supplemental response to the order to show cause on November 2, 1993, together with another request for an evidentiary hearing without, however, any indication of the nature of the evidence he wished to present. The court of appeals accepted the supplemental response but denied the respondent's motion to vacate the November 12 hearing and his request for an evidentiary hearing.

Oral argument was held as scheduled on November 12, and on November 29, 1993, the court of appeals panel issued its order recognizing that it was bound by the findings of the other court of appeals panels in Deherrera and Casillan that the respondent's appeals in those cases were frivolous, and noting that "[a]t oral argument, respondent admitted that he had not paid any of the sanctions that have been imposed on him by this court or the district court." In re Smith, 10 F.3d 723, 724 (10th Cir. 1993).

Accordingly, the court of appeals ordered that respondent "is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied." Id.

II.

We usually impose the same discipline that was imposed in the other jurisdiction in a reciprocal discipline proceeding unless certain exceptions exist. People v. Meyer, 908 P.2d 123, 124 (Colo. 1995). C.R.C.P. 241.17(d) provides in relevant part:

> At the conclusion of the proceedings brought under this Rule, the hearing panel shall refer the matter to the Supreme Court with the recommendation that the same discipline be imposed by the Supreme Court as was imposed by the foreign jurisdiction unless it is determined by the hearing panel that:
>
> (1) The procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law;
>
> (2) The proof upon which the foreign jurisdiction based its determination of misconduct is so

> infirm that the Supreme Court cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;
>
> (3) The imposition by the Supreme Court of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or
>
> (4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court.

The respondent challenges the reciprocal application of the court of appeals order on all four of the above grounds as well as others. In his brief, he raises ten issues that we will address in order.

A.

In his first issue, the respondent claims that the procedure followed in the court of appeals was deficient because he

> was entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit for failing to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and by the U.S. District Court.

In the first place, we do not read the court of appeals order as disciplining the respondent for failure to pay the sanctions imposed against him. The respondent was suspended for filing frivolous appeals, as set forth in the show cause order. After admitting at oral argument that he had not paid any of the sanctions imposed against him, however, the court of appeals made satisfaction of the sanctions he had been previously ordered to pay as a condition for reinstatement. See Smith, 10 F.3d at 724. One of the respondent's premises is therefore false.

Second, the complainant points out that the respondent did not raise this precise argument in either the court of appeals or before the hearing board and that it is therefore waived. We nevertheless elect to address it in the context of whether the respondent's due process rights were violated because of the absence of a jury in the court of appeals discipline proceedings, for the purpose of C.R.C.P. 241.17(d)(1).

By its own terms, the Sixth Amendment right to trial by jury applies only to criminal proceedings: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const.

amend. VI. "A lawyer discipline proceeding is not a criminal proceeding . . . ." People v. Morley, 725 P.2d 510, 514 (Colo. 1986) (citation omitted); see also People v. Varallo, 913 P.2d 1, 3 (Colo.) (same), cert. denied, 117 S. Ct. 80 (1996). The respondent has referred us to no authority in Colorado or elsewhere that the Sixth Amendment right to trial by jury applies to lawyer discipline proceedings, and we are aware of none. In fact, other jurisdictions have held that federal and state constitutional provisions regarding the right to trial by jury do not apply to lawyer discipline proceedings. See, e.g., In re Cornelius, 520 P.2d 76, 83 (Alaska 1974); Attorney Grievance Comm'n v. Kerpelman, 420 A.2d 940, 947 (Md. 1980); Mississippi State Bar v. Young, 509 So. 2d 210, 212-13 (Miss. 1987). Our own Rules of Procedure Regarding Lawyer Discipline and Disability Proceedings, C.R.C.P. 241.1 to 241.6, do not authorize trial by jury. The fact that the respondent was not afforded a jury trial in the court of appeals did not violate either the Sixth Amendment or due process.

B.

The respondent's next issue is that the procedure employed by the Tenth Circuit in the disciplinary proceedings did not comport with the requirements of

due process. In particular, the respondent claims that he did not receive fair notice of the charges against him and he was not given an adequate opportunity to be heard in his defense.

First, the respondent asserts that the court of appeals' show cause order did not adequately apprise him of the charges. Integral to his argument is the respondent's position that he was disciplined for failing to pay the sanctions imposed against him and not for filing frivolous appeals. Again, however, we reject the respondent's characterization of the court of appeals action. The order suspending him indefinitely was for filing frivolous appeals in the two cases mentioned in the show cause order and not for failing to pay the sanctions imposed against him. See Smith, 10 F.3d at 724.

Second, the respondent complains that he was given only ten days in which to file his supplemental response to the part of the show cause order pertaining to Casillan. Implicit in this argument is that the original September 15, 1993 order to show cause did not encompass the Casillan appeal as well as the Deherrera appeal. See People v. Emeson, 638 P.2d 293, 294 (Colo. 1981) (noting that In re Ruffalo, 390 U.S. 544 (1968) "clearly states that the consideration of charges not made in the formal complaint

constitutes a violation of the respondent's rights to procedural due process of law.") A fair reading of the September 15 show cause order, however, set out in section (I) above, discloses that the respondent was to answer to the charges that the appeals in both Deherrera and Casillan were frivolous. We therefore conclude that the show cause order did not violate the respondent's due process rights and there was not error in permitting the respondent less than twenty days to supplement his response to address the Casillan appeal.

The respondent also alleges that he was entitled to an evidentiary hearing before the court of appeals disciplinary panel at which he could "present expert testimony and other relevant evidence . . . ." The court of appeals allowed the respondent fifteen minutes of oral argument to respond to its show cause order. The respondent cites Fed. R. App. P. 46 to support his claim that he was entitled to an evidentiary hearing before the disciplinary panel:

> (b) Suspension or Disbarment. When it is shown to the court that any member of its bar . . . has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an

> opportunity to show cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, . . . the court shall enter an appropriate order.
>
> (c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Fed. R. App. P. 46(b), (c). This rule does not grant the respondent the right to the kind of evidentiary hearing that he requested. The respondent was given the right to argue in person why he should not be disciplined. In the first place, his responses to the order to show cause did not identify any reasons for the testimony of any witnesses, much less expert witnesses. Insofar as the respondent's expert evidence and testimony was intended to be relevant to whether the respondent's appeals in Deherrera and Casillan were frivolous or

not, that issue had already been determined by the court of appeals panels deciding those respective appeals, and the disciplinary panel was without the power to reverse or overrule the findings of the other panels in those cases. See Smith, 10 F.3d at 724. The same analysis resolves the appropriateness of the sanctions the respondent was ordered to pay by the court of appeals and the district court. Expert testimony was either irrelevant to the issues before the disciplinary panel or unnecessary because the disciplinary panel was certainly capable of determining and applying the law to the respondent's case without it.

Finally, the respondent advances no relevant or valid reasons why he was denied his right to be heard before a fair and impartial decisionmaker. The questions before the court of appeals disciplinary panel were limited to whether the respondent had filed frivolous appeals in Deherrera and Casillan, and if so, what the appropriate disciplinary sanction should be. The legality and validity of the monetary sanctions previously imposed had been conclusively determined in the previous cases and could not be collaterally attacked in the disciplinary proceeding. See Smith, 10 F.3d at 724.

We find, as did the hearing board, that the Tenth Circuit disciplinary proceedings did not violate due process.

C.

The respondent next contends that the proof upon which the court of appeals based its determination of misconduct was so infirm that this court cannot, consistent with its duty, accept as final the court of appeals' determination. See C.R.C.P. 241.17(d)(2).

In this exception, the respondent focuses on the insufficiency of the proof to show that he willfully failed to pay the sanctions imposed against him and to rebut the defenses presented in his response and supplemental response to the order to show cause. These defenses included that he had been sanctioned for making arguments either warranted under existing law or good faith attempts to extend, modify, or reverse existing law; and that his failure to pay the sanctions imposed against him was not grounds for discipline, especially since he is unable to pay them.

As we said above, the court of appeals disciplinary panel was foreclosed from redetermining whether the respondent's appeals in Deherrera and Casillan were frivolous. See Smith, 10 F.3d at 724. The respondent was not

disciplined for failing to pay the sanctions imposed against him. His defenses were not relevant to the issues before the panel, and we conclude that the proof relied on by the Tenth Circuit was not so infirm to justify this court's disregarding the disciplinary panel's action.

D.

Moving to the reciprocal discipline proceedings below, the respondent charges that these proceedings did not comport with due process of law, and that the assistant disciplinary counsel engaged in prosecutorial misconduct.

First, the respondent argues that the assistant disciplinary counsel had no right to take the respondent's deposition in the reciprocal discipline proceeding because requiring the respondent to be deposed violated his Fifth Amendment right against self-incrimination.

In Spevack v. Klein, 385 U.S. 511 (1967), the Supreme Court held that the Fifth Amendment privilege against self-incrimination afforded protection to the accused lawyer in a disciplinary proceeding. The lawyer in Spevack was deprived of his rights under the Fifth Amendment when he was disbarred solely because he refused to testify in a judicial investigation into his alleged

improper solicitation of clients. 385 U.S. at 514. We noted in People v. Robnett, 859 P.2d 872, 875 (Colo. 1993), that Spevack did not specifically hold, however, that attorney disciplinary proceedings were criminal in nature for purposes of the Fifth Amendment privilege against self-incrimination. Accordingly, most courts and commentators after Spevack have tended to read the decision narrowly, concluding that disciplinary proceedings are not themselves criminal in nature for purposes of the privilege, and have "limit[ed] the scope of the privilege in disciplinary proceedings to only those disclosures that could be used in a criminal prosecution, or that could lead to other evidence that might be so used." II ABA/BNA Lawyers' Manual on Professional Conduct at 101:2402 (1984); see generally Andrea G. Nadel, Annotation, Extent and Determination of Attorney's Right or Privilege Against Self-Incrimination in Disbarment or Other Disciplinary Proceedings - Post-Spevack Cases, 30 A.L.R.4th 243 (1984 & Supp. 1992).

Consistent with this view of Spevack, the California Supreme Court stated:

> An attorney in a State Bar disciplinary matter does not possess the same immunity from being called to testify as a criminal defendant;

> the attorney "may be called upon to testify but may decline to answer questions on the ground that his testimony would tend to incriminate him." (Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968.)

In re Utz, 769 P.2d 417, 422 (Cal. 1989). Analogously, the hearing board could properly require the respondent to attend his own deposition, at which time he could decline to answer specific questions if invocation of the privilege against self-incrimination was appropriate. The presiding officer of the hearing board was acting within his proper sphere when he ruled on the assistant disciplinary counsel's motions. See C.R.C.P. 241.14(b). Moreover, from the record before us, the respondent did not raise his privilege against self-incrimination in the Tenth Circuit disciplinary proceedings, nor is it obvious why the charges against him for filing frivolous appeals raised the fear of criminal prosecution. Requiring the respondent to attend his own deposition was not an error.

The respondent's second contention is that the assistant disciplinary counsel was guilty of prosecutorial misconduct by asking for sanctions in the event the respondent refused to be

deposed. This objection is baseless and will not be addressed further.

The respondent's final claim is that the board denied him due process when it did not permit the many witnesses, including expert witnesses, to testify at the respondent's hearing. The respondent was not able to justify the calling of these witnesses by means of an offer of proof that they would testify to matters relevant to the reciprocal proceeding. We find that the hearing board quite properly refused to allow the respondent to call these witnesses.

E.

Because the respondent's reciprocal disciplinary proceeding was not a criminal proceeding for purposes of the Sixth Amendment right to a speedy trial, that right was not violated in this case. See In re Briggs, 502 N.E.2d 879, 886 (Ind. 1987).

F.

In his next issue, the respondent argues that the proof before the hearing board was so infirm that this court cannot accept it. While this is a basis for not accepting the determinations of another jurisdiction as to lawyer misconduct and the appropriate sanction, C.R.C.P. 241.17(d)(2), it does not apply to the findings and recommendations of a

hearing board and the supreme court grievance committee hearing panel to this court. Through this exception the respondent attempts to raise the same objections he has already raised, and we have rejected, with regard to the Tenth Circuit disciplinary panel proceedings. This contention is without merit.

G.

The respondent's following two exceptions do not require extended discussion. First, the hearing panel accepted the board's recommendation that the respondent be suspended from the practice of law for nine months; that prior to reinstatement he demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied and that all federal suspensions have been lifted; and in the event that the respondent meets those conditions prior to the expiration of the nine-month suspension, that this court give favorable consideration to the respondent's immediate reinstatement. Contrary to the respondent's claim, this recommendation does not violate C.R.C.P. 241.17(d) because it does not recommend a harsher discipline against the respondent than the Tenth Circuit's indefinite suspension. The definite period of suspension, in this case nine months, is mandated by requirement that all suspension be of definite length in

Colorado, not to exceed three years. See C.R.C.P. 241.7(2). The board's provision that the court give favorable consideration to the respondent's immediate reinstatement if he meets the conditions imposed by the Tenth Circuit, prevents the recommendation from even theoretically violating C.R.C.P. 241.17(d).

Second, the respondent asserts that his due process rights were violated because one of the members of the hearing panel that reviewed the board's action was the presiding officer of the board. We rejected the identical contention in People v. Fitzgibbons, 909 P.2d 1098, 1100-01 (Colo. 1996).

H.

According to the respondent, imposition by the supreme court of the same discipline against him as was imposed by the Tenth Circuit would result in a grave injustice. See C.R.C.P. 241.17(d)(3). The respondent advances no reasons for this proposition, except that under Colorado law a suspension from the practice of law may not be for an indefinite period. This is probably inconsistent with his argument that the sanction recommended by the hearing board is invalid because it is harsher than that imposed by the Tenth Circuit. In any event, the hearing board's

recommendation that the respondent's nine-month suspension be lifted in the event he satisfies the federal sanctions and the Tenth Circuit suspension has been lifted does not violate C.R.C.P. 241.7 at all.

In conclusion, the respondent alleges that "[t]he misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court." C.R.C.P. 241.17(d)(4). It is true that we cannot impose an indefinite suspension on the respondent under our rules. The hearing board attempted therefore to fashion a sanction authorized by our rules and which has an effect similar if not identical to the sanctions imposed by the court of appeals.

We note that in People v. Hartman, 744 P.2d 482 (Colo. 1987), we suspended a lawyer for six months in a reciprocal discipline matter for filing frivolous pleadings in three cases in the United States Tax Court. We conclude that the hearing board's recommendation is a reasonable solution to the problem of the minor incompatibility between federal and state disciplinary procedures. We decline the respondent's invitation to retry the reasonableness of the monetary sanctions imposed by the district court and the court of appeals in cases other than the one before us. Accordingly, we

accept the hearing panel's and hearing board's recommendations.

III.

It is hereby ordered that David Lee Smith be suspended from the practice of law for nine months, effective thirty days after the opinion is issued. It is also ordered that the respondent pay the costs of these proceedings in the amount of $1,863.43 within ninety days from the date on this opinion. It is further ordered that prior to reinstatement the respondent demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied and that all federal suspensions have been lifted; and in the event that the respondent meets these conditions prior to the expiration of the nine-month suspension, the respondent may petition this court for immediate reinstatement.

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
RECIPROCAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

Upon consideration of Respondent's Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact that it is Impossible for Him to Comply With the Colorado Supreme Court's (March 3, 1997) Opinion or to File With Committee Counsel the Affidavit Required by C.R.C.P. 241.22(b), and the Complainant's Response thereto filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Respondent's Verified Motion shall be, and the same hereby is, DENIED.

BY THE COURT, FEBRUARY 11, 1998.

cc: **James C. Coyle**
Asst. Disciplinary Counsel
600 17th Street, Suite 510 S.
Denver, CO 80202

David Lee Smith
1630 Welton Street, #300
Denver, CO 80202

James P. Hollaway
Grievance Committee Counsel
600 17th St., Suite 920 S.
Denver, CO 80202-5435

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, FEBRUARY 19, 1998.

cc: James C. Coyle
Asst. Disciplinary Counsel
600 17th Street, Suite 510 S.
Denver, CO 80202

David Lee Smith
1630 Welton Street, #300
Denver, CO 80202

James P. Hollaway
Grievance Committee Counsel
600 17th St., Suite 920 S.
Denver, CO 80202-5435

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

Upon consideration of the Motion to Vacate Disciplinary Opinion and to Expunge the Disciplinary Record Created by this Opinion, and the Response thereto filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion to Vacate Disciplinary Opinion and to Expunge the Disciplinary Record Created by this Opinion shall be, and the same hereby is, DENIED.

BY THE COURT, JUNE 19, 1998.

cc: James C. Coyle
Asst. Disciplinary Counsel
600 17th Street, Suite 510 S.
Denver, CO 80202

David Lee Smith
1630 Welton Street, #300
Denver, CO 80202

James P. Hollaway
Grievance Committee Counsel
600 17th St., Suite 920 S.
Denver, CO 80202-5435

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

Upon consideration of the Petition for Rehearing of Order Denying Motion to Vacate Disciplinary Opinion and to Expunge the Disciplinary Record Created by this Opinion filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Petition for Rehearing of Order Denying Motion to Vacate Disciplinary Opinion and to Expunge the Disciplinary Record Created by this Opinion shall be, and the same hereby is, DENIED.

BY THE COURT, JULY 1, 1998.

cc: James C. Coyle
Asst. Disciplinary Counsel
600 17th Street, Suite 510 S.
Denver, CO 80202

David Lee Smith
1630 Welton Street, #300
Denver, CO 80202

James P. Hollaway
Grievance Committee Counsel
600 17th St., Suite 920 S.
Denver, CO 80202-5435

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:)
) No. 93-631
DAVID L. SMITH)

Order
Filed November 29, 1993

Before SEYMOUR, BALDOCK and BRORBY, Circuit Judges.

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the court
PER CURIAM

Ollie DAILEY, Plaintiff,

Noemi Alessandra Collie, Appellant,

v.

VOUGHT AIRCRAFT COMPANY,
Defendant.

Noemi Alessandra Collie, Appellant,

v.

International Union, United Aerospace
Workers, Local 848, Defendant.

No. 96-11180.

United States Court of Appeals,
Fifth Circuit.

May 12, 1998.

Frank P. Hernandez, Dallas, TX, for Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before JOLLY, SMITH and DENNIS, Circuit Judges.

DENNIS, Circuit Judge.

Noemi Alessandra Collie, an attorney-at-law, appeals from an order by the district court disbarring her from practice in the United States District Court for the Northern District of Texas until the payment of monetary sanctions imposed upon her and her client for violations of Federal Rule of Civil Procedure 11. Subsequent to filing this appeal, Collie paid the sanctions and was reinstated to practice by the district court. We reverse and vacate the district court's disbarment order. This appeal is not moot because the disbarment on the attorney's record may affect her status as a member of the bar and have other collateral consequences. Because the attorney was not given notice of the charges made or opportunity for explanation and defense prior to disbarment, she was deprived of procedural due process required by the United States Constitution and the district court's own local rules.

I.

Appellant attorney Noemi Collie filed three separate lawsuits on behalf of plaintiff Ollie Dailey against Dailey's employer, Vought Aircraft Company (Vought). The first lawsuit concerned claims of race discrimination and retaliation in violation of Title

VII. After a bench trial, the district court rejected Dailey's claims and entered final judgments for Vought. On motion by Vought, after considering written responses of the parties, the district court found that Collie and Dailey violated Federal Rule of Civil Procedure 11(b)(1) and (b)(3) by repetitiously asserting essentially the same claims in two other lawsuits. The district court imposed sanctions by ordering Collie and Dailey to pay the costs and attorney's fees Vought incurred in defending the actions. Dailey appealed the sanctions order. This Court affirmed. See Dailey v. LTV Aerospace & Defense Co., Nos. 95-10156 & 95-10437 (5th Cir. 1996).

Subsequently, on June 18, 1996, the district court ordered Collie and Dailey to pay the imposed sanctions of $8,478.92 within eleven days. After the sanctions were not paid timely, the district court, on July 18, 1996, disbarred Collie pending their payment, without giving Collie notice or an opportunity to be heard with respect to her disbarment. Collie moved the district court for reconsideration and petitioned the chief judge of the district for relief under local rules. The district court denied reconsideration but amended its order to allow Collie to continue representing clients in five particular cases. The chief judge denied Collie's appeal.

Collie appealed to this court from the decisions of the district court and the chief judge of the district on September 19, 1996. The next day Collie moved this court to stay the district court orders. This court denied the stay. Collie paid the monetary sanctions on September 23, 1996. The district court, after receiving notice of the payment, issued an order reinstating Collie to practice in the Northern District of Texas on October 7, 1996.

II.

Because Collie paid the monetary sanctions in full and was reinstated to practice before the Northern District of Texas, we consider first whether her appeal is moot. Matter of Commonwealth Oil Refining Co., 805 F.2d 1175, 1180-81 (5th Cir. 1986), cert. denied, 483 U.S. 1005, 97 L.Ed.2d 734, 107 S.Ct. 3228 (1987). The grant of subject matter jurisdiction to the federal courts found in Article III of the United States Constitution extends only to actual "cases" and "controversies." U.S. Const., art. III, sect. 2; Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 108 L.Ed.2d 400, 110 S.Ct. 1249 (1990). These terms serve to limit the federal judicial power in two ways. 15

JAMES W. MOORE ET AL., MOORES FEDERAL PRACTICE, § 101.01, 101-14 (3d ed. 1997). First, federal courts may only address questions presented in an adversary context and in a form amenable to resolution through the judicial process. Id. Second, the judiciary's role is constrained to the extent necessary to prevent intrusion upon areas which are more appropriately handled by the other two branches of the federal government. Id. The term justiciability serves to give expression to this dual limitation imposed upon the federal courts by the case or controversy requirement. Id.

The justiciability of an issue, in turn, is determined by the doctrines of standing, mootness, and ripeness. Id. § 101.01, 101-13. The Supreme Court has explained that "mootness [is] the 'doctrine of standing set in a timeframe[.] The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 63 L.Ed.2d 479, 100 S.Ct. 1202 (1980)(citation omitted); see also Arizonans For Official English v. Arizona, 137 L.Ed.2d 170, 117 S.Ct. 1055, 1068 (1997); Lewis, 494 U.S. at 477-78.

Under this doctrine, although a justiciable controversy may have existed at the time litigation was commenced, the action must be dismissed for want of jurisdiction if the controversy ceases to exist at some point in the litigation. Calderon v. Moore, 518 U.S. 149, 116 S.Ct. 2066, 2067, 135 L.Ed.2d 453 (1996)(per curiam); Church of Scientology of California v. United States, 506 U.S. 9, 12, 121 L.Ed.2d 313, 113 S.Ct. 447 (1992); 15 MOORE ET AL., § 101.90, 101-165. Furthermore, a federal court is obligated to raise the issue, sua sponte, if the facts suggest mootness notwithstanding the silence of the parties with respect to the issue. United States v. Rice, 404 U.S. 244, 245, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971); MOORE ET AL., § 101.92, 101-168.

A case may become moot for several reasons. One such reason can be an intervening factual event which causes the plaintiff to no longer have a present right to be vindicated or a stake or interest in the outcome. Calderon, 116 S.Ct. at 2067; MOORE ET AL., § 101.92, 101-169. An intervening event, however, will only render a plaintiff's action moot if the plaintiff is divested of all personal interest in the result or the effect of the alleged violation is

completely eradicated and the event will not occur again. MOORE ET AL., § 101.93[2], 101-170. The availability of even partial relief is enough to prevent mootness. Id.; Church of Scientology, 506 U.S. at 450; 13A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.2 (2d ed. 1984).

Even if the plaintiff's primary injury has been resolved, the collateral consequences doctrine serves to prevent mootness when the violation in question may cause continuing harm and the court is capable of preventing such harm. Sibron v. New York, 392 U.S. 40, 53-59, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968); 1 ROTUNDA & NOWAK, TREATISE OF CONSTITUTIONAL LAW § 2.13 (2d ed. 1992); Moore et al., § 101.99[3], 101-190. As long as the parties maintain a "concrete interest in the outcome" and effective relief is available to remedy the effect of the violation, the size of the dispute is irrelevant. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 571, 81 L.Ed.2d 483, 104 S.Ct. 2576 (1984). Although the collateral consequences doctrine is most often used to enable review of expired criminal sentences, it frequently has been applied in the civil context. WRIGHT ET AL., § 3533.3; MOORE ET AL., § 101.00[3], 101-190.

In Connell v. Shoemaker, 555 F.2d 483, 486-487 (5th Cir. 1977), the Commanding Officer at Fort Hood prohibited military personnel from renting residential property owned or managed by the appellants, the Connells, for 180 days in response to allegations that appellant Ted Connell had discriminated against black military personnel in renting apartments. The appellants filed suit in December 1974 seeking declaratory and injunctive relief from the 180 day prohibition. The district court granted summary judgment in favor of the appellee on the ground of mootness as the appellee had lifted the prohibition after the 180 day time period had expired and Ted Connell had given his assurance that there would be no future acts of discrimination.

This Court reversed because the "continuing practical consequences of the Army's determination of discrimination [were] sufficient to negate mootness." Id. at 486. Specifically, the "imputation of bigotry implicit in the Army's widely publicized sanctions" could not but harm the appellants' reputations and concomitantly their livelihoods as the success of the businesses in which the appellants held interests depended on the maintenance of a favorable public

image. Id. at 487. The moral stigma of the sanction imposed by the appellee harmed the aspirations of Ted Connell as a local politician. Id.

This Court applied the collateral consequences doctrine to defeat a claim of mootness in Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986). Umanzor, a citizen of El Salvador, was deported from the United States on October 14, 1983. Before his deportation, Umanzor had applied for political asylum; his request was denied. This Court relied on the collateral consequences doctrine in rejecting the argument that Umanzor's release from the custody of the airline transporting him to Central America mooted the appeal of his habeas corpus claim. Specifically, we noted that aliens who have been arrested and deported are ineligible for visas for purposes of readmission into the United States for five years and are guilty of a felony if entry, or an attempted entry, into the United States does occur. Id. at 1301.

As the "mere possibility of adverse collateral consequences is sufficient to preclude a finding of mootness," Collie's case was not rendered moot by her payment of the sanctions and reinstatement to

practice in the Northern District of Texas. Id. (quoting Sibron v. New York, 392 U.S. at 55). Because admission to the appropriate bar is an absolute prerequisite to the practice of law, it is hardly inconceivable that disbarment, even if only temporary, can be detrimental to an attorney's professional reputation, well-being, and success. Collie explains in her brief that the nature of her practice results in the majority of her cases being litigated in federal court. Although she now able to practice in the Northern District of Texas, her professional record continues to be tarnished. The order disbarring Collie remains of record and open to perusal by the judges and attorneys of any court before which she seeks to practice. It is reasonably foreseeable that the disbarment on Collie's record may have a detrimental impact on her professional career.

Our decision in United States v. Schrimsher (In re Butts), 493 F.2d 842 (5th Cir. 1974), strongly supports this conclusion by analogy. Butts, an attorney, was found to be in contempt of court and ordered incarcerated for two hours. On appeal, the government argued that Butts's appeal was moot as he had already served his period of confinement.

We disagreed holding that collateral legal consequences rendered the mootness doctrine inapplicable. Id. at 844. This Court pointed out the collateral consequences of Butt's criminal conviction, i.e. its availability for impeachment and future sentencing purposes. Moreover, this Court continued:

> Conviction for contempt of court could also have serious adverse career consequences for Butts. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage Butts' reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open court. In light of these possible collateral consequences, Butts' appeal is not 'abstract, feigned, or hypothetical' so as to justify dismissal for mootness. See Sibron, supra, 392 U.S. at 57.

Schrimsher (Butts), 493 F.2d 844.

The potential collateral consequences of a criminal contempt conviction that prevented mootness in Butts' case are identical or quite similar to the serious adverse career consequences of disbarment that threaten Collie.

Because of its inapposite and distinctive context, In re Taylor, 916 F.2d 1027 (5th Cir. 1990)(per curiam), does not persuade us that the present appeal is moot. The district court sanctioned Taylor for use of an unprescribed substance outside of court and apparently unrelated to his law practice, ordering him to undergo drug monitoring, provide and advertise free legal services to indigents, secure professional liability insurance, and provide an accounting of the work done and cost incurred. The court stated that Taylor would be subjected to further sanctions, including disbarment, if he failed to comply with these conditions. Taylor appealed but resigned from the bar prior to this Court's consideration of the case.

This Court in Taylor concluded that the appeal was moot and vacated the judgment below for several reasons. Taylor's practice related conditions and

obligations under the district court's order ended upon his resignation from the bar. This Court would not condone a self-help type stay which would allow Taylor to avoid the order while challenging it. In addition, this Court concluded that the possible collateral consequences in Taylor's case were too remote, characterizing his argument on this subject as "insufficient." Taylor, 916 F.2d at 1028. Moreover, the Court apparently excepted the controversy from mootness in the event that Taylor sought readmission and the district court reinstated its sanctions order. Id., n. 1; Id. (Rubin, J. concurring).

The circumstances of the present case distinguish it categorically from Taylor. Collie did not resign from the bar. She is an active practitioner who suffers from the stigma of a recorded disbarment. Rather than attempt to avoid the district court's order to pay monetary sanctions, Collie complied with it and now seeks relief from the real and significant threat of adverse consequences to her law practice and career.

III.

Having decided that Collie's appeal is not moot, we consider whether her disbarment must be set aside because the district court deprived her of procedural due process as she was not afforded notice and an opportunity to be heard prior to being expelled from the bar.

Although disbarment is intended to protect the public, it is a "punishment or penalty imposed on the lawyer." In re Ruffalo, 390 U.S. 544, 550, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968). Disbarment or suspension proceedings are adversarial and quasi-criminal in nature. Id. at 551; United States v. Brown, 72 F.3d 25, 29 (5th Cir. 1995); In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992). As such, an attorney is entitled to procedural due process which includes notice and an opportunity to be heard in disbarment or suspension proceedings. Ruffalo, 390 U.S. at 550; Ex Parte Bradley, 74 U.S. (7 Wall.) 364, 375, 19 L.Ed.214 (1868); Medrano, 956 F.2d at 102; NASCO, Inc v. Calcasieu Television and Radio, Inc., 894 F.2d 696, 706-07 (5th Cir. 1990), aff'd sub nom., Chambers v. NASCO, 501 U.S. 32, 115 L.Ed.2d 27, 111 S.Ct. 2123 (1991); see also Standing Comm. On Discipline v. Ross, 735 F.2d 1168, 1170 (9th Cir.), cert. denied, 469 U.S. 1081 (1984)(at a minimum, an attorney subject to discipline is entitled to procedural due-

process, including notice and an opportunity to be heard). The burden of proving all of the elements of a violation rests with the moving party. Medrano, 956 F.2d at 102. A federal court may only disbar an attorney upon clear and convincing evidence of a violation warranting this extreme sanction. Id.; NASCO, 894 F.2d at 699.

Moreover, Local Rule 13.2(b) affords an attorney similar procedural due process protections as part of any disciplinary action taken by a district court. The rule provides:

> (b) Grounds for Disciplinary Action. This Court may, after the member has been given an opportunity to show cause to the contrary, take any appropriate disciplinary action against any member of its Bar.

N. DIST. TEX. R. 13.2(b)(1996)(Emphasis added).

Federal district courts are bound by the disciplinary rules they implement. Matter of Thalheim, 853 F.2d 383, 386, 388 (5th Cir. 1988). Although we conclude that the only logical reading of this rule requires notice and an opportunity to be heard before an attorney is

disciplined by the court, any ambiguity in the rule must be construed in favor of the attorney charged with behavior warranting discipline. Brown, 72 F.3d at 29. Cf. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531 (1864)("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy this right they must first be notified.")

The record unequivocally shows that the district court did not provide Collie with notice or an opportunity to be heard before disbarring her. The court, on June 18, 1996, ordered Collie and her client to pay the imposed sanctions within 11 days. Without notifying Collie that the failure to timely pay the sanctions constituted grounds for disbarment, and without affording her an opportunity to be heard on the subject, the district court, on July 18, 1996, disbarred Collie until such time as the sanctions were paid.

Collie's unsuccessful appeal of the disbarment order to the chief judge of the district did not repair the district court's violation of her rights to due process under the Constitution and the court rules. Prior to an attorney's

disbarment, he or she is entitled to notice of the charges made and an opportunity to explain or defend (except for extreme misconduct occurring in open court, in the presence of the judge). Ruffalo, 390 U.S. at 550. This principle has been clearly and consistently expressed by the Supreme Court. Theard v. United States, 354 U.S. 278, 282, 1 L.Ed.2d 1342, 77 S.Ct. 1274 (1957)("Disbarment beg the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred."); Ex parte Robinson, 86 U.S. (19 Wall.) 505, 511, 22 L.Ed. 205 (1873)("Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence."); Ex parte Garland, 71 U.S. (32 How.) 333, 378, 18 L.Ed. 366 (1866)("They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded."). See also Burkett v. Chandler, 505 F.2d 217, 222, n.5 (10th Cir. 1974), cert. denied, 423 U.S. 876, 46 L.Ed.2d 110, 96 S.Ct. 149 (1975)(disbarment proceeding void due to

absence of prior notice or opportunity to be heard notwithstanding provision in local rule for review of disbarment judgment.). There may be cases of such gross and outrageous conduct in open court as to justify very summary proceedings for an attorney's suspension or removal from office, "but even then he should be heard before he is condemned." Robinson, 86 U.S. (19 Wall.) at 513, n. 6 (citing Ex parte Bradley, 74 U.S. (7 Wall.) 364, 19 L.Ed. 214 (1868); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354, 20 L.Ed. 646 (1871)). Cf. Ruffalo, 390 U.S. at 354 (White, J. concurring)("A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed."). See also Johnson v. Waddell & Reed, Inc., 74 F.3d 147 (7th Cir. 1996)(Rule 11(c)(1)(B)'s requirement that court imposing sanctions on its own initiative describe the specific conduct that appears to be a violation and direct the alleged violator to show cause to the contrary was intended to insure due process; court's procedure of giving attorney after-the-fact opportunity to convince court to set aside rule violation it had already determined and

imposed sanctions for did not comply with either the letter or spirit of the rule); Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1027 (5th Cir. 1994)(due process requires notice and an opportunity to be heard before Rule 11 sanctions are imposed).

Moreover, the Supreme Court in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 542-548, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), held that, in the termination of a public employee, dischargeable only for cause, a post-termination hearing cannot satisfy the requirements of due process except when it is coupled with pretermination notice and pretermination opportunity to respond. Accord Clements v. Airport Authority of Washoe County, 69 F.3d 321, 333-334 (9th Cir. 1995)("In the context of process due a terminated public employee, a full post-deprivation hearing does not substitute for the required pre-termination hearing."); Chaney v. Suburban Bus Division of the RTA, 52 F.3d 623 (7th Cir. 1995); Cotnoir v. University of Maine Systems, 35 F.3d 6, 12 (1st Cir. 1994)(Constitutional deprivation complete when employee fired without pre-termination protections; therefore, post-termination grievance proceedings could

not compensate for absence of pretermination process.); Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 262-263 (1st Cir. 1987), cert. denied, 486 U.S. 1044 (1988)(opportunity to appeal after notification of action is constitutionally inadequate). This Court has recognized that Loudermill clearly established that post-termination proceedings can satisfy due process requirements only when coupled with adequate pretermination process in public employment termination cases. See Price v. Brittain, 874 F.2d 252, 260-261 (5th Cir. 1989).

Even if we were to consider this case improperly under the Loudermill standards, instead of appropriately under the Supreme Court's attorney disciplinary cases, we would still conclude that Collie was not afforded the process that she was due for two reasons. First, she was not given notice and an opportunity to respond prior to her disbarment. Second, the review of her disbarment by the chief judge was insufficient even for Loudermill due process purposes, not only because it was not coupled with a pre-disbarment notice and opportunity to respond, but also because of its own inherent deficiencies. The mere

opportunity unsuccessfully to bring due process violations to the attention of a discretionary appellate-type forum does not constitute the notice and opportunity to be heard that is guaranteed by the Due Process Clause. See Cole v. Arkansas, 333 U.S. 196, 201-202, 92 L.Ed. 644, 68 S.Ct. 514 (1948).

Moreover, the hearing with the chief judge did not afford ample opportunity to show cause why Collie should not be disbarred: Collie's attorney was given only two days' or less notice of the hearing; the attorney objected to conducting a hearing on such short notice; and the attorney was not granted adequate time to fully prepare and defend his client.

IV.

The district court's only objective in disbarring Collie was to enforce its order that she or her client pay monetary sanctions to reimburse Vought its costs and attorney's fees in defending unwarranted actions. The district court's disbarment order expressly stated that, in order to enforce its monetary sanctions order, it was necessary to bar Collie from practice until the sanctions

had been paid in full. The district court did not expressly or implicitly find that Collie was unfit to practice law. On the contrary, the court specifically permitted Collie to continue to represent clients in five particular cases. Moreover, the court fully reinstated Collie to practice when it received notice that she had paid the sanctions in full. Consequently, because the only goal of the district court's disbarment order has been fully attained, and all of the underlying litigation has been finally resolved, the proper disposition of this case is to reverse and vacate the district court's order disbarring Collie. See Ruffalo, 390 U.S. at 551-52; Robinson, 86 U.S. (19 Wall.) at 512; Thalheim, 853 F.2d at 389-90; Schrimsher (Butts), 493 F.2d at 845.

Conclusion

Accordingly, this court renders judgment that the district court's order disbarring Noemi Alessandra Collie is REVERSED and VACATED.

JERRY E. SMITH, Circuit Judge, dissenting:

I respectfully dissent from the majority's reversal of the suspension order.[8] Although the district court initially violated Collie's procedural due process rights by failing to give her a hearing before ordering her suspension, that violation was cured by the subsequent hearing before the chief judge. Moreover, I would find that the chief judge did not abuse his discretion by ordering Collie suspended from practice before that court until her sanctions were paid.

I.

I agree with the majority that the district court's failure to give Collie a hearing prior to her suspension was constitutionally infirm because due

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[8]Although I am uncomfortable with the majority's justiciability analysis, the issue is foreclosed by binding circuit precedent, and thus we are obliged to reach the merits. See Walker v. City of Mesquite, 129 F.3d 831, 832 (5th Cir. 1997).

process requires that an attorney be given notice and an opportunity to be heard before he is suspended or disbarred, not after. The majority and I part company, however, when it comes to whether the district court successfully cured that violation through the subsequent hearing before the chief judge. It is well established that "a procedural due process violation is not complete 'unless and until the State fails to provide due process.' In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation" become actionable. McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting Zinermon v. Burch, 494 U.S. 113, 126, 110 S.Ct. 975, 983-84, 108 L.Ed.2d 100 (1990)).[9]

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[9]In the usual manifestation of the "cure doctrine," not present in this case, the plaintiff would be able to recover damages from the governmental actor only for the period between his deprivation without due process and the subsequent sufficient due process hearing. See, e.g., Wheeler v. Mental Health & Mental Retardation Auth., 752 F.2d 1063, 1070 (5th Cir. 1985). Because Collie alleges only the harm of "stigma"

The relevant question, therefore, becomes whether the "subsequent due process hearing was sufficient to cure the defect." Best v. Boswell, 696 F.2d 1282, 1288 (11th Cir. 1983). The majority offers two reasons for answering this question in the negative. First and foremost, it relies on cases holding that procedural due process requires an antecedent hearing to deprivation. Secondarily, the majority finds that the chief judge's hearing was flawed because Collie did not receive adequate notice.

Unfortunately, the majority's primary justification for rejecting the later hearing has nothing to do with the cure doctrine. Rather, it concerns what constitutes a procedural due process violation in the first instance. I reiterate that I do not disagree with the majority that Collie was entitled to a hearing before suspension. Had she, for

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F.2d 1063, 1070 (5th Cir. 1985). Because Collie alleges only the harm of "stigma" (the monetary sanction having been affirmed in an earlier appeal), and because I find the chief judge's suspension order--and any accompanying "stigma"--were properly imposed, no relief is warranted.

instance, suffered some distinct, quantifiable harm for the period between deprivation and hearing, she would be entitled to a remedy. But see supra not 2.

But the majority appears to hold that a hearing subsequent to suspension can never act as a cure because the cure comes after the deprivation. The very definition a "cure," however, is a procedurally sufficient hearing that comes after a procedural due process violation has occurred, that is, after the deprivation has taken place. For this reason, the cases that the majority cites, see, e.g., Cleveland Bd. of Educ. V. Loudermill, 470 U.S. 532, 542-48, 105 S.Ct. 1487, 1493-97, 84 L.Ed.2d 494 (1985), are inapposite, for they deal with what constitutes a procedural due process violation in the first instance and do not implicate the analytically distinct doctrine of a cure for such a violation once it has occurred.

The majority's secondary justification for rejecting the chief judge's hearing--lack of notice--does not go to the adequacy of the cure. Unfortunately, here, the majority's conclusion is unsupported by the facts.

Collie was given more than adequate notice of the September 6, 1996, hearing before the chief judge. By July 18, Collie knew of the charges against her and the fact that suspension was being considered. On July 29, she filed a request for a hearing before the chief judge, and she did so again on September 4. He granted her request that day and held the hearing on September 6.

Collie raised no objection prior to the hearing. She obviously knew it to be an evidentiary hearing, as she brought witnesses and asked to enter testimony.

At that point, Collie had fifty days to prepare for an evidentiary hearing and to consider the nature of the charges against her and the appropriateness of the suspension. Under our caselaw, this amount of time is more than adequate notice for such proceedings. See Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1027 (5th Cir. 1994) (attorney given seven hours notice prior to FED. R. CIV. P. 11 hearing.).

The hearing before the chief judge was also procedurally sufficient. Collie was able to present witnesses and to develop a record. At that point, the

chief judge had "absolute discretion" either to follow the district judge's order or to chart a different course given his independent findings. See N. DIST. TEX. R. 13.2(b). In short, Collie was given an "effective opportunity to rebut" the charges against her. Glenn v. Newman, 614 F.2d 467, 472 (5th Cir. 1980).

II.

The majority's analysis seems to be driven by its view that this suspension order was unwarranted. I disagree.

When a court imposes sanctions based on its inherent powers, they must be "essential to preserve the authority of the court" and must be the least severe sanctions adequate to achieve that end. Scaife v. Associated Air Ctr. Inc., 100 F.3d 406, 411 (5th Cir. 1996) (internal citation and quotation marks omitted). "If there is a reasonable probability that a lesser sanction will have the desired effect, the court must try the less restrictive measure first." Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 86 F.3d 464, 467 (5th Cir. 1996).

To impose such sanctions, the court must make a specific finding that the attorney acted in "bad faith." Elliott v. Tilton, 64 F.3d 213, 217 (5th Cir. 1995). We review such a finding for abuse of discretion. See Dawson v. United States, 68 F.2d 886, 895 (5th Cir. 1995).

A.

Collie's conduct meets the legal standard for imposing suspension. The chief judge, after a full and fair hearing, found that Collie "had willfully ignored [the district judge's] orders." The chief judge found Collie's statement that she had "overlooked" the deadline unbelievable, because, "it was a critical deadline," and "[s]he met one of those deadlines but not another." I see no ground for finding this factual determination clearly erroneous.[10] See United States v. Jackson, 19 F.3d 1003, 1007 (5th Cir. 1994) (citation omitted) (holding that credibility judgments are particularly within the province of the factfinder).

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[10]In her brief, Collie admits that her failure to pay the fine was willful: Having insufficient funds, she never intended to satisfy the fine.

The chief judge, moreover, was justified in finding that suspension was the least severe action available to preserve the court's authority; forcing attorneys to comply with orders sanctioning them is essential to maintaining that authority. If an attorney fails to pay assessed sanctions, it is difficult to see how any sanction less than suspension can satisfy that end. Certainly, more monetary sanctions would be useless, especially when the attorney lacks the funds to pay them.

B.

The majority's failure to recognize that before imposing suspension, the district court did "find that Collie was unfit to practice law," is also incongruent with the existing jurisprudence. Collie's failure to pay the sanctions made her unfit per se to practice law before the district court.

We have authorized the practice of forbidding a litigant from filing pleadings until he has satisfied a sanction, even if he is unable to pay.[11]

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[11] See, e.g., Smith v. Legg (In re United Markets Int'l, Inc.), 24 F.3d 650, 655-56 (5th Cir. 1994) (customary litigant); Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1034 (5th Cir. 1990)

We now should follow the Seventh and Tenth Circuits and hold that "[a] lawyer who is unwilling, or unable, to pay accumulated sanctions must desist from practice until he can follow the court's orders." In re Maurice, 69 F.2d 830, 835 (7th Cir. 1995).[12] Attorneys practicing before a court should be held to a higher, not lower, standard than are pro se litigants.

Unfortunately, the majority charts a different course. In doing so, its ruling has the effect both of imposing stricter disciplinary requirements upon pro se litigants than upon attorneys, and of removing the only effective deterrent to an indigent attorney's flaunting of the district court's authority. Accordingly, I respectfully dissent.

(attorney litigant); Gelabert v. Lynaugh, 894 F.2d 746, 748 (5th Cir. 1990) (per curiam) (prisoner litigant).

[12]See Cleveland Hair Clinic, Inc. v. Puig, 106 F.3d 165, 168 (7th Cir. 1997); In re Smith, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam). In Maurice and Puig, the attorney was given an opportunity to show cause why he should not be suspended. In Smith, the attorney already had had such an opportunity at oral argument.

SUPREME COURT, STATE OF COLORADO
Case No. GC 95B-124
ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE GRIEVANCE COMMITTEE

FINDINGS OF FACT AND RECOMMENDATIONS OF THE HEARING BOARD

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

vs.

DAVID LEE SMITH,

Respondent.

This matter was heard on November 25 and 26, 1996 in Denver, Colorado, before a hearing board ("board") composed of Mark D. Korman and Bethiah Beale Crane, enlisted members of the Bar, and John F. Gallagher, Presiding Officer. The People were represented by James C. Coyle, Assistant Disciplinary Counsel, and the respondent appeared pro se.

The Complaint charged the respondent with violations of Rule 241.6 of the Colorado Supreme Court Rules Concerning discipline of Attorneys, the Colorado Rules of Professional Conduct, R.P.C. Rule 8.4(a) (violation of a rule of professional conduct), Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice); and Rule 8.4(h) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law).

The board heard testimony from the respondents' witnesses (Robert Atkinson, Jr., Julia Hook, James E. Qualls and Bennett J. Wasserman) and considered statements and arguments by Mr. Coyle and Mr. Smith.

The complainant's exhibit 1 was received into evidence. The complainant's exhibit 5, the alleged Certificate of Service, was offered into evidence, but not admitted. The respondent's exhibits A, B, Q and r were received into evidence. The respondent's exhibits C through P, and S and T, were offered into evidence, but not admitted.

On November 22, 1996, the respondent filed the following:

(1) A Motion to Dismiss Complaint With Prejudice For Lack of Independent Prosecutor with the Supreme Court of the United States. A ruling on that motion was deferred, and said motion is hereby denied.

(2) A document styled "Respondent's Suggestion that the Supreme Court of Colorado Lacks Jurisdiction of the Subject Matter of the Complaint," which requested relief of an order dismissing the complaint. Ruling on that request was deferred and is hereby denied.

At the outset of hearing, the following motions were made:

1. The complainant orally moved to sequester witnesses. The motion was granted as to fact witnesses, excluding Julia Hook and the expert witnesses.

2. The respondent orally moved for dismissal of the complaint on grounds of the complainant's failure to provide a speedy trial and that the disciplinary counsel's office was aware of respondent's disbarment by the United States Supreme Court on November 7, 1995, yet it did not serve the complaint on respondent until December 29, 1995. Ruling on that motion was deferred and is hereby denied.

At the close of testimony, the parties were requested to file by December 5, 1996 additional information or position statements addressing the meaning and impact of disbarment by the United States Supreme Court, and that Court's requirement for reinstatement to practice before it. The complainant submitted additional information, including an affidavit from Deborah L. Ortiz, Disciplinary Counsel Investigator, stating that an attorney disbarred by the United States Supreme Court may petition for readmission to that court after completing three years of good standing in the jurisdiction where the lawyer is licensed, and the petition is subject to review by the full court.

On December 4, 1996, respondent filed his "Motion for an Expedited Determination of His Guilt or Innocence on the Charges of the Complaint, and Statement of Position on the Issue of the Duration of a Disbarment by the Supreme Court of the United States." Respondent stated that he had been unable to find any authority on the issue of the duration of a disbarment by the United States Supreme Court, and requested an expedited decision by this board.

On December 4, 1996, respondent filed his "Verified Supplement to Record

Concerning Certificate of Service Obtained by Assistant Disciplinary Counsel James C. Coyle from Rolf G. Asphaug." Respondent therein recited his recollections of fact concerning a question addressed to him at hearing as to the filing with this board of certain documents.

On January 8, 1997, complainant filed a Supplement to its Response to Respondent's Verified Statement to Record Concerning Certificate of Service which presented a set of certified copies received from the United States Supreme Court on January 7, 1997 of a motion for just damages and double costs and certificate of service regarding such motions received by the United States Supreme Court on February 15, 1995.

On January 13, 1997, respondent filed a "Motion to Strike Response and Supplement to Response filed by Assistant Disciplinary Counsel James C. Coyle," which requests the striking of the document presented by complainant as a certified copy of the certificate of service. Given the conclusion below, ruling on this motion is moot.

FINDINGS OF FACT

Based on the evidence presented, the board finds that the following facts are established by clear and convincing evidence:

1. The respondent was licensed to practice law in the State of Colorado on October 6, 1975, registration number 6934. The respondent is subject to the disciplinary and disability jurisdiction of the Colorado Supreme Court and its Grievance Committee in these disciplinary proceedings. C.R.C.P. 241.1(b), et seq.

2. The respondent was disbarred from the Supreme Court of the United States on November 27, 1995 for failing to comply with a March 6, 1995 order of that Court (copy attached and marked as complainant's exhibit A).

3. The March 6, 1995 order with which the respondent failed to comply granted a motion by the Regional Transportation District for award of damages and double costs related to the respondent's filing of a Petition for Writ of Certiorari with the United States Supreme Court in the case of James Edward Qualls and David L. Smith v. Regional Transportation District, et al. No. 94-1283, which the Regional Transportation

District claimed was frivolous. The respondent was ordered to pay $500.00 to counsel for the Regional Transportation District on or before March 27, 1995.

4. The respondent did not pay the $500.00. The respondent argued at hearing that he deliberately chose not to because he wanted the opportunity to contest the order upon which it was based.

5. An Order to Show Cause was entered by the Court on October 2, 1995 ordering the respondent to pay the $500.00 as previously ordered with 21 days, and to show cause in writing why he should not be disbarred from the practice of law in the Court or otherwise disciplined for failure to comply with the previous order. The respondent was suspended from practice before the Court pending outcome of the matter.

6. The respondent filed a Verified Response to Rule to Show Cause on October 25, 1995, but did not pay the $500.00 which he had previously been ordered to pay.

7. U.S. Supreme Court Rule 8 provides as follows:

> Rule 8. Disbarment and Disciplinary Action
>
> 1. Whenever it is shown to the Court that a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, that member will be suspended from practice before this Court forthwith and will be afforded the opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.
>
> 2. The Court may, after reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule of the Court.

8. The United States Supreme Court did not charge the respondent with conduct unbecoming a member of the Bar of the Court, did not allow 40 days in which he would be afforded the opportunity to show cause, and did not conduct a hearing of any sort.

9. A lawyer disbarred from the practice of law before the United States Supreme Court may petition for readmission after completing three years of good standing in the jurisdiction in which the lawyer is licensed.

10. Failure to pay a court ordered fine is not, in and of itself, grounds for disbarment in any jurisdiction.

DISCUSSION

11. This matter was prosecuted as a reciprocal proceeding based upon Rule 241.17. Independent violations of other disciplinary rules were also alleged, although no evidence was presented by Complainant in support of these violations other than the fact of the respondent's disbarment by the United States Supreme Court.

12. Rule 241.17(d) requires this board to refer the matter to our Supreme Court "with the recommendation that the same discipline be imposed by the Supreme Court as was imposed by the foreign jurisdiction" unless the board determines one of the following four exceptions has been met:

(1) The procedure followed in the foreign jurisdiction did not comport with requirements of due process of law;

(2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;

(3) The imposition by the Supreme Court of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or

(4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court.

13. The complainant's case relied entirely upon the fact of the respondent's disbarment from the United States Supreme Court. Exploration of the basis and procedure related to the disbarment was made by extensive factual and expert testimony presented in defense of the respondent's actions.

14. The respondent essentially asserted two defenses. First, he argued his refusal to pay the $500.00 fine imposed by the Court was based upon his good faith belief that his original Petition for Writ of Certiorari was not frivolous, and that it had not received adequate consideration as an argument for extension or change of existing law. He believed disobeying the Court's order was the only avenue available to obtain further review of his case, and that the risk he faced, by not paying the fine, was a possible further sanction or threat of contempt. Second, the respondent contended he was not afforded due process in his disbarment, and that the conduct which led to his disbarment did not amount to an ethical violation which would warrant professional discipline in Colorado.

15. The respondent's tenacious quest for review of his client's case by the United States Supreme Court might be considered by some as ill-conceived, overzealous, or even bizarre quirkiness. Many attorneys, including the board members, would probably have conceded defeat, or at least paid the Court's sanctions while pursuing further review. The board members believe that the respondent's decision to not pay the Court's sanctions at least by deposit to the Court, if not to Mr. Asphaug, was unwise. The board is nevertheless persuaded that the respondent's refusal to pay the sanction reflected his belief, albeit also his poor judgment, that this was a necessary choice in order for his case to have a chance for additional review by the Court. The board also believes the discipline reasonably risked by pressing further review in such manner was an additional monetary sanction or a possible threat of contempt, and not disbarment.

16. Moreover, the board is extremely concerned with the process which led to the respondent's disbarment. Expert testimony was presented in the area of professional responsibility generally, and practice before the United States Supreme Court. That evidence demonstrated that the failure to pay a

court ordered sanction was not the basis for disciplinary action in any jurisdiction, or the United States Supreme Court. The complainant presented no evidence that such a failure was the basis for disciplinary action in Colorado.

17. It also appears to the board that the United States Supreme Court failed to follow the requirements of its own Rule 8, set forth above, by failing to advise the respondent that he was charged with "conduct unbecoming a member" of the Court, failing to afford the respondent a full 40 days within which to show cause, and failing to conduct a hearing on the material disputed fact of the reason behind the respondent's refusal to pay the $500.00 sanction. Taken as a whole, the evidence strongly implies that the majority of the Court's Justices did not review and may not have been aware of the respondent's disbarment. It appears to the board that the disciplinary action was taken by the Court's clerk and treated as a ministerial act.

18. Also troubling is the information presented in the affidavit of Deborah L. Ortiz, outlining that a lawyer disbarred from the practice of law before the United States Supreme Court may

petition for readmission after completing three years of good standing in the jurisdiction in which the lawyer is licensed. If the respondent's license to practice law in Colorado is revoked because of his disbarment by the United States Supreme Court, then his ability to petition for readmission to the United States Supreme Court after three years good standing in Colorado is foreclosed. The United States Supreme Court's readmission policy seems to contemplate the absence of reciprocal discipline in a lawyer's licensing jurisdiction.

CONCLUSIONS

19. The board concludes that the respondent's inability to be heard in a meaningful time and manner as required by the United States Supreme Court's Rule 8 amounts to a denial of due process, and that the proof upon which the disbarment was founded was so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the United States Supreme Court's determination. Additionally, the board believes that the imposition by the Colorado Supreme Court of the same discipline imposed by the United States Supreme Court would result in grave injustice to the respondent. Hence, the board concludes that the

exceptions in Rule 241.17(d) have been satisfied so as to preclude a recommendation that the Colorado Supreme Court impose the same discipline as that imposed by the United States Supreme Court.

20. The board also concludes that the respondent's actions did not constitute a violation of any of the Colorado Rules of Professional Conduct set forth in the complaint (R.P.C. Rules 8.4(a), 8.4(d) or 8.4(h)).

RECOMMENDATION

The hearing board recommends to the hearing panel that the complaint filed in this disciplinary proceeding be dismissed.

DATED this 6th day of March, 1997.

Mark D. Korman

Bethiah Beale Crane

John F. Gallagher
Presiding Officer

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SA169
RECIPROCAL PROCEEDING IN DISCIPLINE,
GC 95B-124

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

DAVID LEE SMITH,

Respondent.

Upon consideration of the Complainant's Petition for Review Pursuant to C.R.C.P. 241.15(b)(1) filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Complainant's Petition for Review Pursuant to C.R.C.P. 241.15(b)(1) shall be, and the same hereby is, DENIED.

BY THE COURT, May 16, 1997.

cc: James C. Coyle
Disciplinary Counsel
600 - 17th Street, #510 South
Denver, CO 80202-5434

David Lee Smith
1630 Welton Street, #300
Denver, CO 80202

James Hollaway
Grievance Committee Counsel
600 - 17th St., #920 South
Denver, CO 80202-5434

David Lee Smith
5800 E. 6th Avenue Parkway
Denver, CO 80220